IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KATHLEEN HARDEE, Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	No. 83728-7 En Banc Filed July 7, 2011

J.M. JOHNSON, J.—A statute provides that the State's decision to revoke a home child care license should be upheld if it is supported at an evidentiary hearing by a preponderance of the evidence. In *Ongom v. Department of Health*, 159 Wn.2d 132, 134, 148 P.3d 1029 (2006), we held that due process requires the State to support a decision to revoke a nursing assistant's registration under the higher standard of clear and convincing evidence. The question in this case is whether constitutional requirements of

due process require the State to support its decision to revoke a home child care license by the higher standard of clear and convincing evidence. We hold that it does not and overrule our decision in *Ongom*.

The Department of Early Learning[1] (Department) revoked Kathleen Hardee's license to operate her home child care business. Hardee requested an administrative hearing, and the hearing officer rescinded the Department's revocation. A review judge reversed the hearing officer and issued an order revoking Hardee's license. In her order, the review judge determined that the Department proved its case against Hardee by a preponderance of the evidence. The superior court and the Court of Appeals affirmed the order. Hardee argues that constitutional due process requires the Department to prove its case by clear and convincing evidence and that the review judge did not properly defer to the hearing officer's findings of fact.

We affirm the Court of Appeals and hold that, at an administrative hearing, constitutional due process requires no more than a preponderance of the evidence to justify the revocation of a home child care license. In doing so, we overrule our previous decision in *Ongom*. We further hold that the

[1] Prior to July 2006, the Department of Social and Health Services regulated child care agencies. *Hardee v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 48, 51 n.1, 215 P.3d 214 (2009).

review judge gave appropriate deference to the hearing officer's findings of fact and that the equal access to justice act (EAJA), RCW 4.84.350, does not entitle Hardee to attorney fees.

Facts and Procedural History

Hardee worked as a licensed home child care provider for 22 years. Sometime in the year 2000, the Department grew concerned with the actions of Hardee's teenage son, William, who lived in her home.[2] In 2001, concerns regarding William culminated when he received a juvenile conviction for harassment, intimidation of a student, and fourth degree assault for threatening a person at school with a knife. Because of William's disqualifying criminal conviction, the Department initiated an action to revoke Hardee's home child care license, but ultimately abandoned the action because William left the home.[3] William returned to the home in 2003 under a safety plan that prohibited him from having unsupervised access to child

[2] The Department received allegations of aggressive behavior by William, including physical altercations with his mother, threatening to bring an AK-47 rifle to school, making a blow torch using hair spray and a lighter, threatening teachers, animal abuse, pointing an air gun at a young child's head, and showing a child how to start a fire using an aerosol can.

[3] William was sent to the Martin Center in Bellingham, Washington, from June 11, 2002, until the end of March 2003.

care children. Throughout 2004-2005, Hardee requested two similar waivers to allow William to remain at her house, despite his disqualifying conviction.

In July 2006, the Department received a report from the King County Sheriff's Office. King County reported that William, then 19 years old, sexually assaulted a three year old child that he babysat. The child victim did not attend Hardee's child care, and the sexual assault did not occur during child care hours. However, the incident occurred in Hardee's home.[4] King County charged William with first degree rape of a child. William pleaded guilty of first degree child molestation and was incarcerated.

In response to King County's 2006 referral, the Department suspended Hardee's license and initiated an investigation. The Department concluded that Hardee violated conditions of the 2003 safety plan and subsequent waivers. The investigation revealed allegations that William had unsupervised access to children in Hardee's child care business.[5] The investigation also led to allegations that Hardee failed to report other

[4] The Court of Appeals mistakenly concluded, contrary to the testimony taken at Hardee's administrative hearing, that the sexual assault did not occur in Hardee's home.

[5] Specifically, one parent stated that he walked into Hardee's home and saw William changing his two year old daughter's diaper. Another parent alleged that Hardee left William at the home with the children while she ran errands.

individuals who lived in her home who had not received mandatory criminal background checks and that Hardee provided child care after her 2006 suspension. The Department revoked Hardee's license on the basis of its investigative findings.

Hardee requested an administrative hearing to challenge the license revocation. An administrative law judge (ALJ) conducted the hearing, rendered factual findings, concluded that the revocation was unwarranted, and rescinded the license revocation. A review judge disagreed with the ALJ, issuing a final order containing revised factual findings and revoking Hardee's child care license.[6] The review judge denied Hardee's petition for reconsideration. Hardee petitioned the superior court for review of the decision and order. The superior court affirmed. On appeal, the Court of Appeals affirmed the superior court. *Hardee v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 48, 63, 215 P.3d 214 (2009). Hardee then successfully petitioned this court for review. *Hardee v. Dep't of Soc. & Health Servs.*, 168 Wn.2d 1006, 226 P.3d 781 (2010).

[6] The review judge found that William had unsupervised access to children in violation of the 2003 safety agreement and 2004 waiver. She also determined that Hardee allowed unidentified people to be present in her home during child care hours of operation. The review judge concluded that Hardee lacked the personal characteristics necessary to provide child care.

Analysis

Hardee argues that constitutional due process requires the Department to justify its revocation of her home child care license by clear and convincing evidence, that the review judge failed to give proper deference to the ALJ's factual findings, and that she is entitled to attorney fees under the EAJA. We disagree. We hold that, at an administrative hearing to revoke a home child care license, the requirement that the Department justify its revocation by a preponderance of the evidence satisfies due process. We expressly overrule *Ongom*. We further hold that the review judge gave appropriate deference to the ALJ's findings of fact, and that the EAJA does not entitle Hardee to attorney fees.

A. Standard of Review

The Administrative Procedure Act (APA) governs judicial review of administrative agency decisions. RCW 34.05.510; *see also Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The party challenging an agency decision has the burden of demonstrating the invalidity of the agency's action. RCW 34.05.570(1); *see also Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38

(2008). The APA provides nine bases on which to challenge an agency decision, two of which involve instances where "[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied" and where "[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(a), (e); *see also Thurston County*, 164 Wn.2d at 341. When reviewing an administrative agency decision, we stand in the same position as the superior court. *Thurston County*, 164 Wn.2d at 341. Whether an agency order, or the statute supporting the order, violates constitutional provisions is a question of law and "[w]e review issues of law de novo." *Id*.; *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). An agency order is supported by substantial evidence if there is "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Thurston County*, 164 Wn.2d at 341 (internal quotation marks omitted) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

B. Administrative Proceedings and the Burden of Proof

The statute governing Hardee's administrative hearing requires a

preponderance of the evidence to uphold the Department's action. The statutory authority governing the Department's licensing procedures may be found in chapter 43.215 RCW. It provides that, at an administrative hearing, the ALJ shall uphold the Department's decision to revoke a home child care license if a preponderance of the evidence supports the decision. RCW 43.215.300(2). Hardee challenged the Department's revocation decision at an administrative hearing. According to the legislature, the preponderance of the evidence standard was the proper evidentiary burden to place on the Department.

Hardee argues that constitutional due process requires a clear and convincing evidentiary standard.[7] "The function of a standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct.

[7] Hardee raises her due process claims under both the Fourteenth Amendment, section 1 of the United States Constitution, and article I, section 3 of the Washington Constitution. Generally, due process challenges to a Washington statute do not require separate analyses under the state and federal constitutions. *See State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996). Hardee does not argue that the state constitution provides greater due process protections nor does she provide analysis of the factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986); *see In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 18 n.12, 84 P.3d 859 (2004) (citing *State v. Smith*, 148 Wn.2d 122, 131, 59 P.3d 74 (2002)). For these reasons we conduct our due process analysis solely under the federal constitution.

1804, 60 L. Ed. 2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring)). The significance of the private interest at stake directly corresponds to the rigor of the burden placed on the State. Rights that touch on fundamental areas of human concern require the State to justify its action by clear and convincing evidence. *See Addington*, 441 U.S. at 432-33 (holding that due process requires a clear and convincing evidentiary standard at a proceeding to involuntarily commit an individual to a state mental hospital); *Santosky v. Kramer*, 455 U.S. 745, 768, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (holding that due process requires a clear and convincing evidentiary standard at a proceeding to terminate parental rights). Rights of lesser significance do not require the State to satisfy a burden beyond the preponderance of the evidence standard. *See Rivera v. Minnich*, 483 U.S. 574, 575, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987) (holding that, in an action to compel child support, due process does not require a burden beyond a preponderance of the evidence standard to prove paternity); *Vance v. Terrazas*, 444 U.S. 252, 266, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980) (holding that due process does not require a burden beyond a preponderance of the evidence standard at an

expatriation proceeding); *see also Steadman v. Sec. & Exch. Comm'n*, 450 U.S. 91, 104, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981) (noting that constitutional due process does not prohibit Congress from adopting the preponderance of the evidence standard to determine whether an individual violated antifraud provisions of federal securities law).

A professional license is a property interest for which revocation requires due process. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 732, 818 P.2d 1062 (1991); *see also Bang D. Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001) (holding that a medical license constitutes a property interest and that due process requires clear and convincing evidence before revocation). However, not all occupations require an identical personal investment and not all state-granted credentials constitute a *professional* license.

In light of our decisions in *Nguyen* and *Ongom*, the Court of Appeals has struggled to determine which evidentiary standard should apply to administrative hearings that affect an individual's ability to engage in her occupation of choice. *Compare Eidson v. Dep't of Licensing*, 108 Wn. App. 712, 32 P.3d 1039 (2001) (holding that the preponderance standard applies to

a real estate agent), *and Kabbae v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 432, 192 P.3d 903 (2008) (holding that the preponderance standard applies to an adult-home caregiver), *and Brunson v. Pierce County*, 149 Wn. App. 855, 205 P.3d 963 (2009) (holding that the preponderance standard applies to exotic dancers), *and Kraft v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 708, 187 P.3d 798 (2008) (holding that the preponderance standard applies to a program manager at an adult home), *and Islam v. Dep't of Early Learning*, 157 Wn. App. 600, 238 P.3d 74 (2010) (holding that the preponderance standard applies to a home child care provider), *with Chandler v. Office of Ins. Comm'r*, 141 Wn. App. 639, 173 P.3d 275 (2007) (holding that the clear and convincing standard applies to an insurance agent), *and Nims v. Wash. Bd. of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002) (holding that the clear and convincing standard applies to a licensed engineer).

1. *The* Mathews[8] *Test*

To determine whether the legislative standards for an adjudicative proceeding satisfy constitutional due process requirements, we consider three

[8] *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Post v. City of Tacoma, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Applying the *Mathews* factors, the preponderance of the evidence standard promulgated by the legislature satisfies due process at an administrative proceeding to revoke a home child care license.

i. First Mathews Factor – Private Interest

Providing care to children is an enormous responsibility and an occupation that merits great societal respect. However, a license for a home child care facility is not a personal interest that compels a standard of proof beyond a preponderance of the evidence. A license to operate a home child care business adheres to the facility and not the individual provider. WAC 170-296-0020 (defining "family home child care" as a "facility licensed to provide direct care" to children). Unlike a professional license, the

Department can revoke a home child care license for the misconduct of a resident other than the provider. WAC 170-296-0210, -0215. A provider can obtain a license for a home by completing a mere 20 hours of state approved training. WAC 170-296-1410(5)(d). Further, an individual who wishes to care for children but who lacks the requisite qualifications to obtain a license, can still potentially work in the field as a child care staff member. WAC 170-296-1410(6) (defining the less stringent requirements for "child care staff"). Someone who loses her license but continues to feel a vocational calling to provide child care can still work in the field under the supervision of another licensed child care provider.

ii. Second Mathews Factor – Risk of Erroneous Deprivation and Value of Additional Procedural Safeguards

It is unlikely that requiring the additional procedural safeguard of a different evidentiary standard is necessary to curtail erroneous deprivations of home child care licenses. Adjudicative proceedings already exist that afford significant procedural safeguards to a home child care provider. At an administrative hearing, a home child care provider benefits from an unbiased tribunal, notice of the proposed action and the grounds asserted for it, an opportunity to present reasons why the proposed action should not be taken,

the right to call witnesses, the right to know the evidence against her, the right to have a decision based only on the evidence presented, the right to counsel, the making of a record of the proceedings, public attendance of the proceedings, and judicial review of the proceedings. *See generally* RCW 34.05.410-.598 (establishing applicable procedures for administrative proceedings and judicial review of such proceedings); *see also* Harry J. Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1279-95 (1975) (discussing the elements of a fair hearing). While additional procedural safeguards will always decrease the likelihood of revocation, that fact alone does not justify their adoption. Rather, the current procedures must suffer from inadequacies that make erroneous deprivations readily foreseeable. The current procedural protections in place sufficiently protect against erroneous deprivations.

iii. Third Mathews Factor – Government Interest

The State's interest in protecting children from the threat of physical and sexual abuse is paramount. The legislature expressly states that "[t]o safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance . . . is paramount over the right of any

person to provide care." RCW 43.215.005(4)(c). Though our inquiry concerning the State's interests does not defer to legislative proclamations, statutory aims and objectives serve as strong independent evidence of a public good's value. The State holds the highest interest in the protection of children. In fulfilling its obligation to protect children, the State must be able to regulate the providers and facilities to which we entrust their care. A requirement that the Department perfect its case to a quasi-criminal standard of proof could endanger children and ignores the reality and the responsibility of the State to protect its most innocent and vulnerable residents.

2. *The* Nguyen *Decision*

Hardee argues that our decisions in *Nguyen* and *Ongom* compel a different result. *Nguyen* is unlike the present case and does not stand for the general proposition that the State's revocation of any occupational credential requires clear and convincing evidence.[9] *Nguyen* specifically addresses the unique context of a medical doctor's property interest in his license to

[9] Our decision in *Nguyen* is not without its critics. *See Nguyen*, 144 Wn.2d at 534-55 (Ireland, J., dissenting); *Ongom*, 159 Wn.2d at 151-57 (Owens, J., dissenting); *see also N.D. State Bd. of Med. Exam'rs v. Hsu*, 726 N.W.2d 216, 228-30 (N.D. 2007); *In re Miller*, 2009 VT 112, 186 Vt. 505, 989 A.2d 982, 992 (2009); *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 771 (Tex. App. 2005); *Uckun v. Minn. State Bd. of Med. Practice*, 733 N.W.2d 778, 785 (Minn. App. 2007).

practice medicine. *Nguyen*, 144 Wn.2d at 522 ("At its heart this case concerns the process due an accused physician by the state before it may deprive him his interest in property and liberty represented by his professional license.").

Disciplinary proceedings against physicians affect a greater property interest than that of a home child care provider despite the great respect we owe the latter. Physicians hold a unique role in our society. Historically, they belonged to one of the three paradigmatic professions: law, medicine, and pastoral ministry. *See* Samuel Haber, The Quest for Authority and Honor in the American Professions, 1750-1900, at 4-5 (1991); *see also* Nathan O. Hatch, *Introduction: The Professions in a Democratic Culture, in* The Professions in American History 3 (Nathan O. Hatch ed., 1988); William M. Sullivan, Work and Integrity: The Crisis and Promise of Professionalism In America 2 (1995). Becoming a licensed physician requires a four year undergraduate degree, a four year postgraduate degree, and additional years of residency training. Physicians must pass multiple tests and examinations before licensure and maintain continuing educational requirements thereafter. A physician's license is not limited to a particular location. Once licensed, a

physician may engage in his or her craft anywhere within the jurisdiction that issued the license. The physician holds the medical license – not the facility in which the physician administers care. Because the license is held by the individual, a disciplinary board cannot predicate a revocation of the license on the misconduct of other individuals. Upon revocation of the license, a physician can no longer engage in the practice of medicine. The physician cannot administer medical care under the guise of being a lesser type of medical provider. The unique education, investment, and personal attachment of a physician's license indicates that the physician holds a greater property interest in the license than that of a home child care provider in the provider's state-granted credential. Our decision in *Nguyen* is distinct from the facts presented by Hardee's case.

3. *The* Ongom *Decision*

Ongom presented a more difficult case. The license at issue in *Ongom* lacked many of the characteristics traditionally associated with the historical professions and the licensee had a personal interest in her certification lesser than that held by a physician in his or her medical license. *See Ongom*, 159 Wn.2d at 157-58 (Owens, J., dissenting). Despite Ongom's more limited

property interest, we held that her disciplinary proceedings required application of the clear and convincing standard. *Id*. at 142. We based this holding on the premise that Ongom's case was indistinguishable from *Nguyen*. *Id*. ("In sum, this case is on all fours with *Nguyen* . . . .").

To arrive at this holding, we applied the "generalized considerations set forth in" *Mathews*. *Id*. at 138. Applying the first *Mathews* factor, we rejected the argument that we could distinguish *Nguyen* on the basis of the personal interest at stake. *Id*. We said:

> Although undoubtedly a medical license is much more difficult to obtain than a registration to practice as a nursing assistant . . . [w]e cannot say Ms. Ongom's interest in earning a living as a nursing assistant is any less valuable to her than Dr. Nguyen's interest in pursuing his career as a medical doctor.

Id.

Looking to the second *Mathews* factor, we rejected the argument that we could distinguish *Nguyen* on the basis of the additional procedural protections afforded to Ongom under the APA. *Id*. at 140. We said that "[w]hile there are certainly some differences in the facts and procedures at issue . . . these differences do not justify a distinction in the eyes of the law and . . . the potential risk of error is not appreciably different." *Id*.

Lastly, in light of the third *Mathews* factor, we rejected the argument that we could distinguish *Nguyen* on the basis of the nature of the governmental interest. *Id*. at 141-42. Determining that the inquiry is not about the "ultimate governmental interest which justifies the licensing scheme in the first place" we said, "'[T]his requirement relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure for the one currently employed.'" *Id*. at 141 (quoting *Nguyen*, 144 Wn.2d at 532). Moreover, we concluded that the clear and convincing standard promoted the government's primary interest in accurate proceedings. *Id*. at 142.

Upon careful reconsideration of its reasoning and effects, we now overrule *Ongom*. "[O]verruling prior precedent should not be taken lightly." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). We will not overrule a precedent unless there is "'a clear showing that an established rule is incorrect and harmful.'" *Id*. at 280 (internal quotation marks omitted) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). *Ongom* is both incorrect and harmful precedent; therefore, it is overruled.

Ongom is incorrect because of its flawed application of the *Mathews* factors. First, *Ongom* confused the *interest* at stake in a disciplinary proceeding with Ongom's subjective *desire* to engage in her occupation. For purposes of the *Mathews* analysis, the personal interest at stake in a proceeding is the property interest (i.e., the license) and not one's subjective desire to perform work in the job of one's choosing. To determine the value of this property interest, a court must look to objective measures of investment (e.g., time, money, education, etc.) rather engaging in the hopeless task of weighing the subjective value each individual places on his or her chosen occupation. *See Mathews*, 424 U.S. at 340-43 (applying objective measures to distinguish the value of the welfare benefits at stake in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), from the value of the disability benefits at stake in *Mathews* and holding that only the former requires an evidentiary hearing before adverse administrative action).

A license is an endorsement that lends credibility and esteem to an individual. It is a benefit granted by the State and it encourages third parties to believe that the State sanctions and positively evaluates the work of the license holder. In the present case, the Department's revocation of Hardee's

license is not an absolute prohibition that terminates her right to provide child care of any sort. Rather, the revocation is a withdrawal of the State's endorsement and certificate of approval.

Ongom incorrectly applied the first *Mathews* factor when it mistakenly focused on Ongom's desire to work as a nurse compared to Nguyen's desire to practice medicine. *See Ongom*, 159 Wn.2d at 138. This is not the proper inquiry. The proper inquiry should focus on objective measures to determine the value of the property interest that the State seeks to take away – i.e., the license. It is therefore relevant to consider the time, expense, and education invested to obtain the license. This is not some sort of elitist value judgment.[1] It is simply one realistic measure of the property interest at stake in an administrative proceeding.

Second, *Ongom* failed to apply the second *Mathews* factor. *Ongom* failed to apply the second *Mathews* factor because it determined, without explanation, that Ongom's procedural protections under the APA were

[1] There is no identifiable correspondence between the financial and property interests associated with an occupation and the societal value of an occupation. The disparity in salaries between a kindergarten teacher and a professional basketball player or between a social worker and a famous stand-up comedian cannot be interpreted as measuring their contributions to society. The disparity in salary is a product of the market. It does not support judgments regarding the relative worth of these occupations.

sufficiently similar to Nguyen's. *Id.* at 140. This too is incorrect. The adequacy of procedural protections is context dependent. *Compare Mathews*, 424 U.S. at 349 (not requiring an evidentiary hearing for revocation of disability benefits), *with Goldberg*, 397 U.S. at 260-61 (requiring evidentiary hearing for revocation of welfare benefits). *Ongom*, however, failed to address the adequacy of the procedural protections afforded to Ongom in her particular context. This inquiry is essential to the second *Mathews* factor that requires us to evaluate, not only the risk of erroneous deprivation, but also "the probable value, *if any*, of additional or substitute procedural safeguards . . . ." *Mathews*, 424 U.S. at 335 (emphasis added).

Third, *Ongom* misapplied the third *Mathews* factor. Describing the government interest factor, *Ongom* incorrectly stated that "'this requirement relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure for the one currently employed.'" *Ongom*, 159 Wn.2d at 141 (quoting *Nguyen*, 144 Wn.2d at 532). *Ongom*'s reliance on *Nguyen*'s dicta is misplaced. *Mathews* did not limit the government's interest to its interest in maintaining current procedural protections vis-à-vis providing additional procedural protections. While the

governmental interest *includes* the financial and administrative burdens of providing additional procedural protections, its interest is not *limited to* such considerations. *See Mathews*, 424 U.S. at 335 (describing the third factor as "the Government's interest, *including* the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" (emphasis added)).

Because of its misapplication of the *Mathews* factors, *Ongom* was incorrect. The decision is also harmful. As the United States Supreme Court noted in *Mathews*:

> [T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.

Id. at 348. Due to the scarcity of resources, a decision that requires the State to direct more time and money towards administrative hearings can ultimately harm the very individuals the administrative proceeding was designed to protect. *See id*. ("[T]he cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for

any particular program of social welfare are not unlimited.").

The present case illustrates the harmful consequences of *Ongom*'s reasoning. Like other sexual assaults, the sexual abuse of children almost always occurs in private. The perpetrator typically selects the victim on the basis of the child's vulnerability, vulnerability that often includes the child's inability to report the abuse and a lack of physical evidence. This is most aggravated when the victim is a young child or an infant. The circumstances surrounding the crime make it, in most instances, extremely difficult to prove. This is true even for criminal prosecutors supported by experienced detectives and a professional police force.

Despite these inherent evidentiary hurdles, *Ongom* would compel the Department to use its limited resources to satisfy a quasicriminal standard of proof before revoking its endorsement of a child care facility – even when a preponderance of the evidence indicates that the children in the facility were exposed to potential sexual abuse. This requirement is potentially very harmful and is not constitutionally mandated.

Because it is both incorrect and harmful, *Ongom* is overruled. We hold that, at an administrative hearing to revoke a home child care license, the

statutory requirement that the Department justify its revocation by a preponderance of the evidence satisfies constitutional due process. Our decision in *Nguyen* does not control because, unlike the present case, it involved an individual's unique property interest in a *professional* license. Our decision in *Ongom* is overruled.

C. Deference of the Review Judge to the ALJ

When reviewing the factual findings and conclusions of an ALJ,

> The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, ... In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

Tapper, 122 Wn.2d at 404 (emphasis omitted) (quoting RCW 34.05.464(4)); *see also* WAC 170-03-0620 (providing the Department's own definition of the review judge's authority). Regardless of whether "[i]t would perhaps be more consistent with traditional modes of review for courts to defer to factual findings made by an officer who actually presided over a hearing," the legislature chose otherwise. *Tapper*, 122 Wn.2d at 405. "[I]t is not our role to substitute our judgment for that of the Legislature." *Id.* at 406. The findings of fact relevant on appeal are the reviewing officer's findings of fact

– even those that replace the ALJ's. *Id*. Here, the review judge meticulously reviewed the evidence, as well as the ALJ's factual findings, and appropriately substituted her own findings when warranted.[11]

Hardee argues that the review judge inappropriately replaced the ALJ's factual findings. According to Hardee, allowing the review judge to replace the ALJ's factual findings renders the ALJ "superfluous." She urges us to adopt the reasoning in *Costanich v. Department of Social & Health Services*, 138 Wn. App. 547, 554-56, 156 P.3d 232 (2007), *rev'd on other grounds*, 164 Wn.2d 925, 194 P.3d 988 (2008).

Hardee's arguments are not persuasive. First, the statute and our case

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[11] The review judge did not replace any express credibility determinations made by the ALJ. For this reason, this case does not require us to determine the appropriate level of deference that a review judge owes the ALJ's credibility determinations. As we noted in *Tapper*:

> Some federal courts have suggested that where the reviewing officer ignores or reverses the credibility findings of the hearing officer, heightened scrutiny should apply to substantial evidence review of any substituted findings of fact. Given the particular solicitude of RCW 34.05.464(4) for the credibility findings of the hearing officer, some such rule would seem to be warranted. However, since this is not a substantial evidence case, we do not address the question of what such a rule would look like.

Tapper, 122 Wn.2d at 405 n.3 (citation omitted). Unlike *Tapper*, this case involves substantial evidence review. However, due to the lack of express credibility determinations, we do not consider what level of deference a review officer owes the ALJ's credibility determinations. *See* RCW 34.05.461(3) ("Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified.").

law do not render the ALJ superfluous. Even where the review judge replaces the ALJ's factual findings, the ALJ still plays a crucial role in affording the licensee an opportunity to be heard, providing notice of the evidence against the licensee, and making a record of the proceedings. Second, *Costanich* is both nonbinding authority and distinguishable. *Costanich* involved interpretation of an administrative regulation distinct from the statutory provision at issue in the case at bar. *See Costanich*, 138 Wn. App. at 554-55. Lastly, the legislature empowered the review judge with the lawful authority to replace the ALJ's factual findings. Even if we agreed with Hardee's reasoning, "it is not our role to substitute our judgment for that of the Legislature." *Tapper*, 122 Wn.2d at 406. We hold that the review judge gave the ALJ's findings of fact appropriate deference.

Further, we hold that substantial evidence supports the review judge's factual findings. The review judge concluded that the Department proved that Hardee violated the terms of her 2003 safety agreement and 2004 waiver by allowing William to have unsupervised access to a child under her care and that she lacked the personal characteristics an individual needs to provide child care. Substantial evidence supports these conclusions. Parental

declarations and testimonial evidence from the hearing supported the review judge's determination that William had unsupervised access to young children in violation of the 2003 safety agreement and subsequent waiver. Although the review judge relied on some hearsay evidence, reliance on hearsay is permissible. RCW 34.05.452(1).

The review judge determined that Hardee lacked the personal characteristics to provide child care. She based this determination on Hardee's poor judgment in allowing William unsupervised access to child care children and Hardee's decision to allow other adults to have access to the children during child care hours.[12] Ample evidence supported these determinations.

D. Attorney Fees

Under the EAJA,

> [e]xcept as otherwise specifically provided by statute, a court shall award a qualified party that *prevails in a judicial review of an agency action* fees and other expenses, including reasonable

[12] The review judge also determined that Hardee exercised poor judgment in allowing William supervised access to child care children. This determination is incorrect. Hardee received a waiver from the Department allowing William to have supervised access to child care children. The Department cannot predicate its revocation of Hardee's license based upon her decision to allow William supervised access when the Department acquiesced to this arrangement. However, the evidence of William's unsupervised access in violation of the safety plan and waivers is sufficient to warrant the review judge's conclusion. Therefore, there is still substantial evidence to support the review judge's order.

> attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.

RCW 4.84.350(1) (emphasis added). Here, Hardee did not prevail in judicial review of the Department's action and she is not entitled to attorney fees.

Conclusion

We hold that, at an administrative hearing to revoke a home child care license, the statutory requirement that the Department justify its revocation by a preponderance of the evidence satisfies constitutional due process. In doing so, we overrule our previous decision in *Ongom*. We further hold that the review judge gave appropriate deference to the ALJ's findings of fact and that the EAJA does not entitle Hardee to attorney fees. We affirm the Court of Appeals and the decision to revoke Hardee's license.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Gerry L. Alexander

Justice Tom Chambers

Justice Susan Owens